

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA
APPLICATION 81 OF 2022

KUEHNE & NAGEL UGANDA LIMITED..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY.....RESPONDENT

BEFORE: DR. ASA MUGENYI, MR. GEORGE MUGERWA, MS. CHRISTINE KATWE.

RULING

This ruling is in respect of a Withholding tax (WHT) assessment of Shs. 1,283,289,792 issued by the respondent on the applicant.

The applicant is a company incorporated in Uganda providing logistics, clearing and forwarding services. The respondent did a refund audit on the applicant for the period 2015 to 2019. On 20th September 2021, the respondent issued a WHT assessment of Shs. 1,283,289,792 on the applicant on the ground that it did not withhold taxes on payments of Shs. 8,548,598,609 to non-resident transporters for the provision of road transport from Mombasa to Uganda. The applicant objected to the assessment and respondent disallowed it. The applicant paid 30% of the tax in dispute.

Issues;

1. Whether the assessment is lawful?
2. What remedies are available?

The applicant was represented by Mr. Bruce Musinguzi while the respondent by Ms. Diana Praff.

The parties opted not to call witnesses but file submissions. The parties filed a joint trial bundle of the evidence they sought to rely on.

The applicant submitted that the dispute is whether the tax assessment of Shs. 1,282,289,792 was lawful. It submitted that under S. 85 of the income tax Act payments to non-resident transporters are not subject to 15% tax. It submitted further that the respondent relied on S. 86(1) of the Income Tax Act to impose withholding tax on international road transport. However, the said provisions were clarified by the amendment of 2022. The applicant submitted that prior to 1st July 2022, S. 86(1) tax was imposed on every nonresident who derives income from the carriage of cargo or mail which is embarked in Uganda. It cited *Roche Transporters and Logistics (U) Limited* Application 94 of 2020 where the Tribunal stated that since the goods were not embarked in Uganda, S. 85 may apply as the parties has a Uganda source service contract. The applicant submitted that the amendment provides that for the avoidance of doubt, income derived from the carriage which is not embarked in Uganda is not income derived from a Uganda source service contract.

The applicant submitted that the intention of Parliament can be looked at in the Hansard. The underlined portion stated that.

“Whereas the income from international transport of passengers and cargo into Uganda was not intended to be taxable in Uganda, this was not expressly stated in Section 85, which led to a risk of being subject to tax under the general clause of Section 86 on income from Ugandan-source service contract.”

The applicant contended that there was no intention to tax such transactions because they are taxed in the country of origin.

The applicant contended that the amendment was meant to clarify the position of the law. It cited *Jafferli M. Alibhai v The Commissioner of Income Tax* [1961] 610 where the court stated that subsequent legislation on the same subject may be referred to an aid to construction where an earlier Act is ambiguous. It also cited *Uganda Revenue Authority v Uganda Tax Operators Association* Civil Appeal 13 of 2015 where it was stated that “if the court finds that the language of the taxation provision is ambiguous or capable of more meaning than one, the court has to adopt the interpretation that favours the tax payer.” It further cited *Russel v Scott House of Lords* [1948] AC 422 where the court

stated that “the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him.”

In respect of the retrospective application of statutes, the applicant cited Commissioner of *Income Tax (Central)-1, New Delhi v Vatkia Township Private Limited* Civil Appeal 8750 of 2015 where the court stated:

“If a legislation confers a benefit on some persons with inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such legislation, giving it a purposive construction would warrant it to be given a retrospective effect.”

It also cited *Arnold v Central Electricity Generating Board* [1987] 3 ALL ER 694. The applicant further submitted that the explanatory notes clearly state the intention was to prevent taxation of international transport since this would have an adverse effect on the business for Uganda.

The applicant analyzed the Tribunal's decision in *Roche Transporters and Logistics (U) Limited* (supra) and contended that the Tribunal was correct to hold that S. 86(1) of the Income Tax Act was applicable but wrong to hold that S. 86(2) was silent. S. 86(1) was specific to road transportation while S. 86(2) provided the tax applicable to a non-resident. The applicant contended that Part VII of the Third Schedule is ambiguous which should be interpreted in favor of the applicant.

In reply, the respondent submitted that the tax assessment in dispute was made on 20h September 2021. The applicant is a resident company, which made payments to nonresidents. The applicant entered into contract with its parent company in Switzerland and other sister companies in Kenya for services which were provided. The respondent submitted that S. 17(2)(b) of the income tax Act provides that the gross income of a person includes income derived from Uganda. S. 79(a) provides that income is sourced in Uganda where it is attributable to any activity in Uganda. It submitted that this implies that as long as there is an activity in Uganda the income is sourced in Uganda. The respondent cited *Roche Transporters and Logistics (U) Limited* (supra) where the

Tribunal stated “Therefore, the transport of goods from the Kenya- Uganda border into Uganda was an activity that occurred in Uganda. Income derived from such an activity is sourced in Uganda.”

The respondent submitted that S. 85 provides for payment of tax on payments to nonresident contractors or professionals under a Uganda source service contract. It cited *Intertek Testing Services International Limited v URA* HCCA 5 of 2002 where the Court stated that “Thus, any service contract qualifies for this tax – as long as the income involved is derived under the aegis of a services contract, and as long as the principal purpose of that contract is the performance of services which give rise to income sourced in Uganda.” It contended that the services were performed under a contract in Uganda and therefore fell under a Uganda service contract. It cited *Primarosa Flowers Limited v the Commissioner of Income Tax*; Appeal 18 of 2013 where it was noted that “...it is a general principle of fiscal legislation that to be liable to tax the subject must fall clearly within the words of the charge imposing the tax, otherwise he goes free.” The respondent submitted that the assessment fell clearly within the words of S. 85 of the income tax Act.

The respondent contended that the fact that the law was later amended does not mean the assessment was unlawful. The respondent argued that the income tax (amendment) Act 2022 did not have retrospective aspect. It contended that the assessment was made on 20th September 2021. The amendment was introduced in 2022 with effective date of 1st July 2022. The Act clearly states that “this Act shall come into force on 1st July 2022. The respondent submitted that it is trite law where a commencement date is provided for in the Act, it is taken as the effective date of the application of the Act. The respondent also submitted that S. 14 of Acts of Parliament Act which provides that the commencement of an Act shall be such date as provided for in the or under the Act. The respondent contended that retrospective application of the Act by the applicant was untenable and inconsistent. The respondent cited *Commissioner General URA V Edulink Holdings Limited* HCA 0178 of 2021 where the court stated that

“...unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute, so as to take away or impair an existing right or create a new obligation or impose a new liability.”

The respondent also cited *Hitendra Vishnu Thakur v State of Maharashtra* (1994) 4 SCC 602 where the court stated that “A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment.” The respondent also cited *Mithilesh Kumari and another v Prem Behari Khare* AIR 1989 SC 1247 where it was stated that, “A retrospective operation is not to be given to a statute so as to impair existing rights or obligations.” It was also stated that “Every law that impairs or takes away rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive.” It also cited *Maxwell on the Interpretation of Statutes* 12th Edition where it stated that “a retrospective operation is not to be given to a statute so as to impair an existing right or obligation.” It submitted that where there are pending proceedings, they cannot be affected by changes in a new law. The respondent argued that there is an obligation on the applicant to pay taxes and an amendment to S. 85 of the income tax Act does not absolve it from paying.

The respondent submitted that the duty to withhold arose on the 15th day of the month in which the payment was made under S. 123 of the Income Tax Act. It submitted that under S. 23(6)(d) the period of payment should be 45 days from the date of service of the notice. The respondent submitted that S. 3 of the Tax Procedure Code Act define the term ‘due date’ to mean the date which a tax obligation must be fulfilled. The respondent also cited *Tullow Uganda Limited v Heritage Oil and Gas Limited* case no. 2011 Foilo 47 where the term due and payable was considered to mean “the amount of tax must not only be owing but be due to be paid.” The respondent submitted that under S. 124 of the income tax Act a withholding agent who fails to withhold the tax in accordance with the Act is personally liable to pay the amount of tax.

The respondent also submitted that in interpreting a taxing statute, one has to look merely at what is clearly said. It cited *Uganda Revenue Authority v Kajura* which cited *Cape Brandy Syndicate v Inland Revenue Commissioners* [1920] 1 KB 64 where it was stated

that in a taxing Act, one has to merely look at what is clearly said. The respondent also cited *Bank of England v Vagliano Bros* 1891 AC 107 where lord Halsbury LCJ said "It seems to me, that construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction." It cited *Roche Transport and Logistics (U) Limited v Uganda Revenue Authority* Application 94 of 2020 where the Tribunal stated that "The applicant contended that there was an ambiguity between Sections 85 and Section 86 of the income tax Act. The Tribunal does not see any ambiguity. The sections complement each other." The respondent stated that it agreed with the conclusion of the Tribunal.

Having and read the submissions of the parties, this is the ruling of tribunal;

The applicant is a logistics and freight company incorporated in Uganda. The respondent conducted a refund audit on the applicant for the period 2015 to 2019. On 20th September 2021, the respondent issued a WHT assessment of Shs. 1,283,289,792 on the applicant on the ground that no WHT was withheld on payments of Shs. 8,548,598,609 to non-resident transporters for provision of road transport from Mombasa to Uganda.

It is not in dispute that the applicant was dealing with non-resident transporters for road transport services from Mombasa to Kampala. It is also not in dispute that the services were procured under a Uganda-source service contract. S. 85 of the Income Tax Act deals with tax on payments to non-resident contractors or professionals. It reads that:

- "(1) Subject to this Act, a tax is imposed on every non-resident person deriving income under a Uganda-source services contract.
- (2) The tax payable by a non-resident person under this Section is calculated by applying the rate prescribed in Part IV of the Third Schedule to this Act to the gross amount of any payment to a non-resident under a Uganda-source service contract.
- (3) Subsection 1 does not apply to a royalty or management charge charged to tax under Section 83.
- (4) In this Section, "Uganda-source services contract" means a contract other than an employment contract, under which –

- (a) the principal purpose of the contract is the performance of services which give rise to income sourced in Uganda; and
- (b) any goods supplied are only incidental to that purpose.”

Part IV of the Third Schedule provides that the income tax rate applicable to a non-resident person under S. 85 is 15 percent.

S. 86 of the Income Tax Act provides for taxation of non-residents providing inter alia shipping, air transport or telecommunication services in Uganda. Prior to 1st July 2022, S. 86 read:

- “(1) Subject to this Act, a tax is imposed on every non-resident person carrying on the business of ship operator, charterer, or air transport operator who derives income from the carriage of passengers who embark, or cargo or mail which is embarked in Uganda and on a road transport operator who derives income from the carriage of cargo or mail which is embarked in Uganda.
- (2) The tax payable by a non-resident person under subsection (1) is calculated by applying the rate of tax prescribed in Part VII of the Third Schedule to this Act to the gross amount derived by the person from the carriage and is treated for all purposes of the Act as a tax on chargeable income.”

The amendment of S. 85 in the Income Tax (Amendment) Act 2022 states that the Section is amended by inserting immediately after subsection (4) the following-

- “(5) For avoidance of doubt income derived from the carriage of passengers who do not embark or cargo or mail which is not embarked in Uganda is not income derived from a Ugandan-source service contract.”

The applicant argued by virtue of the amendment, it is not entitled to withhold tax from non-resident transporters. In *Roche Transporters and Logistics (U) Limited v Uganda Revenue Authority* Application 94 of 2020 the Tribunal stated that:

“The **Oxford Learner’s Advanced Learner’s Dictionary** p. 377 defines embark as “to put something on a ship.” Part VII of the Third Schedule provides that the rate of tax applicable to shipping and aircraft income under S. 86(2) is 2%. The provision on taxation of a road transport operator who derives income was inserted in the Act by the Income Tax Amendment Act in 2002. It is not in dispute that the cargo Ultra Eureka Farm Limited embarked in Uganda was by transport by road. It was not by shipping and aircraft. Therefore while S. 86(1) maybe applicable to the income of Ultra Eureka Farm Limited the

rate in S. 86(2) is not applicable. S. 86(1) reads: "Subject to this Act..." implying that other Sections of the Act will apply where it is silent. However, S. 86 requires the goods to have been embarked in Uganda. Since the goods were not embarked in Uganda, S. 85 may apply as the parties had a Uganda source service contract.

The court went on to find that:

"S. 120 of the Act deals with International payments. It reads:

"(1) Any person making a payment of a kind referred to in Section 83, 85 or 86 shall withhold from the payment the tax levied under the relevant Section."

The Tribunal already stated that the applicant had a Uganda-source service contract. Under Part IV of the Third Schedule the income tax rate applicable to Ultra Eureka Farm Limited was 15%. S. 120 of the Income Tax Act required the applicant to withhold tax on payments it made to Ultra Eureka Farm Limited."

In short, the Tribunal relied on the general provision to make the applicant liable to pay WHT.

In order to understand the intention of the legislature one may make use of a Hansard. A Hansard may be evidence of the intention of Parliament. The applicant cited the explanatory notes of the Hansard which explained the amendment. The applicant stated that the Hansard read

"The objective of this amendment is to clarify the exclusion from taxation in Uganda of international transportation of passengers embarking outside Uganda or cargo or mail which embarks outside Uganda, and is destined for Uganda. Section 86(1) imposes a tax on income from international transportation of passengers embarking in Uganda, or cargo or mail which embarks in Uganda, and is destined outside Uganda. **Whereas the income from international transport of passengers and cargo into Uganda was not intended to be taxable in Uganda, this was not expressly stated in Section 85, which led to a risk of being subject to tax under the general clause of Section 86 on income from Ugandan-source service contract.**" If this tax were to be imposed, there would be a practical challenge of obliging all importers of goods including individuals and unregistered persons to withhold the tax and remit to Government. Further, under best practice of international tax policy, such income is taxable in the country of tax residence of the foreigner transporter. In addition, such a tax would render Uganda's economy

uncompetitive since the cost of all imports would increase by 15% as the transport pass this cost to importers.”

The words underlined and in bold were done for emphasis by the applicant. The Tribunal notes that the applicant did not tender in the Hansard as an exhibit nor is it attached to its submissions. The date of the Hansard or the proceedings of Parliament is not known. It is difficult to rely on a Hansard whose origin is not clear and the words in the explanatory notes maybe suspect.

In the absence of the Hansard, the Tribunal has to look at the amendment and discern the intention of Parliament. The amendment was to the effect that for the avoidance of doubt income derived from the carriage of passenger or cargo or mail who or which do not or does not embark in Uganda is not income derived from a Ugandan – source service contract. In *Roche Transporters and Logistics (U) Limited v Uganda Revenue Authority (supra)* the Tribunal had held S. 86 does not apply to goods that have embarked in Uganda but the goods were transported under a Uganda- source service contract making the transporter liable to pay WHT. The effect of the amendment would be to the reverse the ruling in the said case by stating that embarking of goods is not under a Uganda-source service contract. In essence a transporter does not have to pay WHT. The question is: does the amendment apply to the applicant who transported its goods before it was passed?

S. 85 in the Income Tax (Amendment) Act 2022 states that for “the avoidance of doubt”. It implies that it was clarifying on any doubt that may arise in the interpretation of S. 85. The legislature was not making a new law providing for a new tax. The amendment was not creating a new right or obligation. It was merely clarifying on an existing law. Whether the clarification is correct or not, is not debatable. It is within the powers of Parliament to clarify on the law. Under Article 152 of the Constitution the powers to make laws imposing tax lie with the legislature. The one who has powers to appoint also has powers to disappoint. If the powers to impose tax lie with Parliament, and it is has stated that there was no tax liability imposed by S. 85 and 86 of the income tax Act on transporters where goods embark in Uganda, the Tribunal cannot query the said act. The role of the Tribunal

is to interpret law to effect the intention of the legislature. Where the legislature has clearly stated its intention, the Tribunal cannot divert from it, as the powers to impose tax lie with Parliament. Furthermore, the Tribunal notes that the respondent is a tax collecting agent under the Uganda Revenue Authority Act. In *R v Inland Revenue Commissioners Ex Parte Mfk Underwriting Agents Limited* [1989] STC 873, the Court stated that;

"Every ordinary sophisticated tax payer knows that the Revenue is a tax-collecting agency, not a tax -imposing authority. The tax payer's only legitimate expectation is, prima facie that he will be taxed according to statute, not concession or wrong view of the law..."

The respondent is required to collect taxes in accordance with the right view of the law. If Parliament states that the right view is that no tax should be collected on international transportation of goods, then that is the right view. The amendment was meant to clarify the position of the law.

The respondent stated that the amendment cannot apply retrospectively. It cited *Commissioner General URA V Edulink Holdings Limited* HCA 0178 of 2021 where the court stated that

"...unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute, so as to take away or impair an existing right or create a new obligation or impose a new liability."

The rights to impose tax lie with Parliament and not with the respondent. It is Parliament that creates new obligations or new tax liabilities. The right to the revenue lies with the government, but powers are given to Parliament to create it. The respondent is a mere collecting agent. Where Parliament clearly states that no obligation or liability exists, the Tribunal cannot dispute it. To do so, would mean that it has usurped the role and powers of the legislature, when it is merely required to interpret its intention.

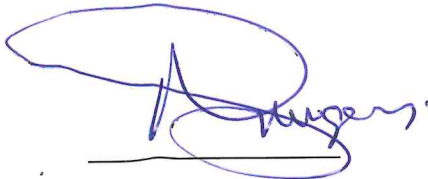
It would be difficult not to apply the amendment retrospectively. If not, it would apply double standards. Those before the amendment would pay taxes while those after would not. It would mean that there are two different interpretations of the same law, yet the English is the same. It would be tantamount to a discriminatory application of a tax law. One of the principles of taxation is that a tax should be applied equally without discrimination. Under the constitution parties are entitled to equal protection of the law.

Taking the above into consideration, the tribunal orders that;

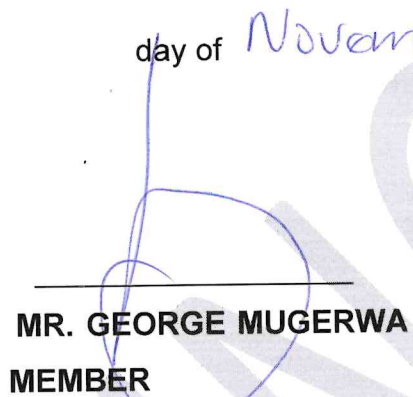
1. Withholding tax (WHT) assessment of Shs. 1,283,289,792 is set aside.
2. The applicant is entitled to costs of the application.

We so order

Dated this 28th day of November 2022.



DR. ASA MUGENYI
CHAIRMAN



MR. GEORGE MUGERWA
MEMBER



MS. CHRISTINE KATWE
MEMBER